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No. 01-1662

IN THE

Supreme Court of the United States

GRID RADIO AND JERRY SZOKA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT NATIONAL ASSOCIATION OF BROADCASTERS IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there a constitutional right to violate federal law by engaging in radio broadcasting without a license?

2. Can an individual avoid sanction for broadcasting without a license in violation of federal law by asserting that a specific rule of the Federal Communications Commission concerning the operation of FM radio stations was contrary to the First Amendment?

3. Did a former rule of the Federal Communications Commission requiring FM radio stations to operate at certain minimum power levels violate the First Amendment?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent National Association of Broadcasters (NAB) states as follows:

> NAB is a non-profit, incorporated association of radio and television stations and broadcasting networks which serves and represents the American broadcasting industry. NAB has not issued any shares or debt securities to the public. NAB has no parent company, and no publicly held company owns 10% or more of NAB's stock.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT NATIONAL ASSOCIATION OF BROADCASTERS IN OPPOSITION

Grid Radio and Jerry Szoka (Petitioners) seek review of a decision of the United States Court of Appeals for the District of Columbia Circuit affirming an order of the Federal Communications Commission (FCC or Commission) directing Mr. Szoka to cease his unlicensed radio broadcasting and imposing a monetary forfeiture. The Petitioners fail, however, to identify any circumstances warranting review by this Court. The instant case simply does not present the principal question posed in the petition for certiorari—namely, whether Petitioners can be subject to government sanction without being allowed to challenge the constitutionality of the law being enforced against it. *See* Petition at 12-13. That is so because Petitioners' conduct violated the bedrock prohibition

against broadcasting without a license. Prior decisions of this Court have made clear that Petitioners had no constitutional or statutory right to broadcast without a license, even if a specific FCC policy concerning the operation of FM radio stations that Petitioners challenge had been constitutionally suspect (which it was not).

Congress in the Communications Act of 1934 expressly prohibited broadcasting without a license, a prohibition that Petitioners admittedly violated. This Court nearly six decades ago determined that the broadcast licensing system established in the Communications Act passes constitutional muster, and that the First Amendment right of free speech does not include the right to broadcast without a license. Because there is no statutory or constitutional right to broadcast without a license, Mr. Szoka was not legally entitled to operate his unlicensed low power radio station, even if the FCC's rules formerly requiring FM radio stations to operate at certain minimum power levels had been constitutionally suspect. Thus, if certiorari were granted, this Court would not have the opportunity to reach the question whether Petitioners were denied a right to challenge the constitutionality of the then-existing low power broadcasting (or "microbroadcasting") rules of the FCC. Petitioners were in acknowledged violation of a requirement whose constitutionality they did not seek to challenge below and do not raise in this Court—the requirement that they obtain a license before broadcasting.

The decisions of this and other courts relied upon by Petitioners as allegedly justifying their "speaking" (*i.e.*, broadcasting) without a license are, moreover, completely inapposite to the instant case because they involve various *nonbroadcast* licensing or permitting requirements that were (unlike the clearly constitutional broadcast licensing system) ultimately found by reviewing courts to be constitutionally infirm. And in the nonbroadcast licensing and permitting

cases cited by Petitioners, the parties—unlike Mr. Szoka in the instant case—would have been entitled to simply start "speaking" once the permitting scheme at issue had been found constitutionally infirm. By contrast, even a court decision invalidating on some basis the FCC's former low power broadcasting rules would not have justified Petitioners commencing broadcast operations without a license in violation of federal law, nor automatically entitled Mr. Szoka to obtain a broadcast license, given the citizenship, character and other requirements necessary for FCC licensure. Regardless of the constitutionality of the FCC's previous low power broadcasting regulations, the court of appeals therefore properly affirmed the FCC's order directing Mr. Szoka to cease his unlicensed broadcasting and imposing a monetary forfeiture. Especially in light of Mr. Szoka's decision to simply start broadcasting without a license, rather than challenge the constitutionality of the FCC's microbroadcasting rules through legally available means, no circumstances warrant review of the circuit court's decision.

Review of the second question presented in the petition for certiorari is not warranted because the FCC's rules formerly requiring FM radio stations to operate at certain minimum power levels did not violate the First Amendment, or even raise any serious constitutional questions. Those rules have also been significantly altered by recent Commission and Congressional action, and there is no reason for this Court to review agency regulations that no longer exist. Accordingly, the petition should be denied.

STATEMENT

Respondent National Association of Broadcasters (NAB) accepts the statement of the case set forth in the brief in opposition of respondent FCC.

REASONS FOR DENYING THE PETITION

I. THIS COURT HAS EXPRESSLY DETERMINED THAT THERE IS NO CONSTITUTIONAL RIGHT TO BROADCAST WITHOUT A LICENSE.

In Section 301 of the Communications Act of 1934, 47 U.S.C. § 301, Congress unequivocally stated that no one should operate as a broadcaster without a license:

> It is the purpose of this Act . . . to *maintain the control of the United States over all the channels of radio transmission* . . . . No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act *and with a license in that behalf granted under the provisions of this Act.* (emphasis added).

As has been frequently explained, this clear prohibition on unlicensed broadcasting is necessary to prevent the "confusion and chaos" that would occur (and in fact did occur in the past) from the unregulated and unlicensed operation of broadcast facilities. *National Broadcasting Co., Inc. v. United States,* 319 U.S. 190, 212 (1943) (prior to 1927 and passage of Radio Act, "new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power . . . at will . . . . With everybody on the air, nobody could be heard."). Because "confusion and interference" are created by multiple broadcasters attempting to use the same "limited" number of "available radio frequencies," Congress in the Communications Act had to allocate "available frequencies and . . . regulate the employment of transmission equipment" for the public to receive the "full benefit of radio audition." *FCC v. Sanders Bros. Radio*

Station, 309 U.S. 470, 474 (1940).[1] The court of appeals in this case similarly emphasized that permitting Mr. Szoka "to operate without a license" would "produce the very 'chaos' that, according to the Supreme Court, the broadcasting licensing regime was designed to prevent." *Grid Radio v. FCC*, 278 F.3d 1314, 1321 (D.C. Cir. 2002) (*quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375-76 (1969)). Pet. App. at A11.

This Court, moreover, determined nearly six decades ago that the licensing system established by Congress in the Communications Act passes constitutional muster, and that the "right of free speech does not include . . . the right to use the facilities of radio without a license." *NBC*, 319 U.S. at 227. During the past 60 years, the courts have not deviated from this determination that requiring a license to broadcast is constitutionally permissible.[2]

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[1] *Accord Turner Broadcasting System v. FCC*, 512 U.S. 622, 637-38 (1994) (because there are more potential broadcasters than available frequencies, "if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all"; this physical limit on frequencies requires "the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters").

[2] *See, e.g., Turner*, 512 U.S. at 638 (*quoting Red Lion*, 395 U.S. at 388) ("it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish"); *United States v. Any and All Radio Station Transmission Equipment*, 218 F.3d 543, 549-50 (6th Cir. 2000) (court held that the First Amendment provided no defense to the forfeiture of the radio transmission equipment of an unlicensed broadcaster because he did "not have a First Amendment right to broadcast his views on an unlicensed radio station"); *United States v. Any and All Radio Station Transmission Equipment*, 204 F.3d 658, 665-66 (6th Cir. 2000) (in a case involving unlicensed microbroadcasters, court observed that the right of free speech did not include the right to broadcast without a license and that "nobody has a First Amendment right to hear radio broadcasts from a station that does not have a First

In light of the six decades of precedent confirming that there is neither a statutory nor a constitutional right to broadcast without a license, "this is a simple case." *United States v. Szoka*, 260 F.3d 516, 522 (6th Cir. 2001) (Sixth Circuit upheld an injunction enforcing FCC cease and desist order against Mr. Szoka's unlicensed operation of a low power radio station on grounds that an "individual cannot broadcast without a license"). Pet. App. at A53. It is not disputed in this case that Mr. Szoka violated Section 301 of the Communications Act by broadcasting without a license. *See Grid Radio*, 278 F.3d at 1316-17 (Pet. App. at A2-A3); Petition at 1-2. The court of appeals therefore properly affirmed the FCC's order directing Mr. Szoka to cease his unlicensed broadcasting and imposing a monetary forfeiture. Indeed, a failure by the court of appeals to uphold the FCC would have contravened the "fundamental purpose of Congress" in passing the Communications Act—to "allocat[e] and regulat[e]" the "use of radio frequencies by *prohibiting such use except under license*." *FCC v. Sanders*, 309 U.S. at 474 (emphasis added).

Amendment right to broadcast them"); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2nd Cir. 1999) (court rejected argument by unlicensed low power radio station that the licensing scheme embodied in the Communications Act unconstitutionally infringed its First Amendment free speech rights); *United States v. Weiner*, 701 F. Supp. 14, 16 (D. Mass. 1988), *aff'd*, 887 F.2d 259 (1st Cir. 1989) (unlicensed broadcasters cannot "look to the First Amendment for authority to broadcast on an unoccupied frequency" in violation of federal law, as the "First Amendment does not grant anyone the right to broadcast by radio").

II. THE CASES RELIED UPON BY PETITIONERS TO JUSTIFY THEIR UNLICENSED BROADCASTING ARE IRRELEVANT TO THE BROADCASTING LICENSING SYSTEM ESTABLISHED IN THE COMMUNICATIONS ACT AND ARE INAPPOSITE TO THIS CASE.

Petitioners identify a number of decisions of this and other courts purporting to establish that a person may with impunity violate a constitutionally suspect "licensing scheme" by proceeding to speak without obtaining a license. *See* Petition at 14-18. The decisions cited by Petitioners as allegedly justifying their "speaking" (*i.e.*, broadcasting) without a license are, however, completely inapposite to the instant case for two primary reasons. First, these cases involve only *nonbroadcast* licensing and permitting requirements. Second, the various licensing and permitting schemes at issue in these cases were ultimately found to be constitutionally infirm. Thus, the laundry list of court decisions set forth in the Petition simply have no relevance to the instant case, and provide no justification whatsoever for the operation of an unlicensed radio station.

As indicated above, none of the licensing or permitting cases identified in the Petition involve the licensing of broadcasting.[3] That alone is a crucial distinction. As this Court has expressly recognized, there is no "unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Turner*, 512

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[3] The cited cases concern licensing or permitting requirements for, *inter alia*, the solicitation of members for an organization (*Staub v. City of Baxley*, 355 U.S. 313 (1958)); engaging in door-to-door canvassing (*Schneider v. State of New Jersey*, 308 U.S. 147 (1939)); the solicitation of money for religious or charitable causes (*Cantwell v. State of Connecticut*, 310 U.S. 296 (1940)); and the distribution or sale of circulars, handbooks or other literature (*Lovell v. City of Griffen*, 303 U.S. 444 (1938)).

U.S. at 388 (*quoting Red Lion*, 395 U.S. at 388).[4] Thus, Mr. Szoka—unlike the nonbroadcast speakers in the cases relied upon by Petitioners—simply had no fundamental constitutional right to speak (*i.e.*, to broadcast) in the first instance. Because Mr. Szoka had no First Amendment right to broadcast that is "comparable" to the essentially "unbridgeable" right to speak, write or publish enjoyed by nonbroadcast speakers, *Turner*, 512 U.S. at 388, the court decisions set forth in the Petition are inapposite to the instant case.

Beyond not addressing unlicensed speech in the context of broadcasting, the cases relied upon by Petitioners involve licensing or permitting schemes that were ultimately found by reviewing courts to be constitutionally infirm.[5] In sharp contrast, this Court has confirmed the constitutionality of the broadcast licensing provisions set forth in the Communications Act, including the provisions prohibiting broadcasting without a license. *NBC*, 319 U.S. at 227 (finding that the "licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce" and that requiring a license to engage in broadcasting was "not a denial of free speech").[6] Because the

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[4] *See also NBC*, 319 U.S. at 227 (the "right of free speech does not include . . . the right to use the facilities of radio without a license").

[5] Some of the permitting schemes at issue in these decisions were found unconstitutional on their face, while others were found to be unconstitutional as applied in the particular case. For example, in *Staub*, 355 U.S. at 325, this Court found that a city ordinance prohibiting the solicitation of members for an organization without a permit unconstitutionally abridged freedom of speech. Similarly, in *Lovell*, 303 U.S. 451-52, the Court concluded that a city ordinance prohibiting the distribution of literature of any kind without a permit unconstitutionally abridged freedom of the press. This Court in *Schneider*, 308 U.S. at 165, held another city ordinance, which prohibited door-to-door canvassing without a permit, to be void as applied to the petitioner in the case.

[6] *Accord Ruggiero v. Reno*, 200 F.3d at 64 (affirming the dismissal of a claim by an unlicensed broadcaster that the "broadcast licensing scheme embodied in the [Communications] Act, which generally prohibits broad-

constitutionality of the broadcast licensing system established in the Communications Act has been consistently affirmed by this and other courts, the decisions cited in the Petition—which involve challenges to permitting schemes found by courts to be *invalid*—cannot justify the operation of an unlicensed radio station or the invalidation of a forfeiture for violating the bar on unlicensed broadcasting. Obviously, nonbroadcast cases confirming the First Amendment right of persons to speak without obtaining a license under a constitutionally infirm licensing scheme have no relevance to the instant case, where Mr. Szoka "spoke" without obtaining a license under a statutory broadcast licensing system that this Court determined to be constitutional six decades ago.

III. PETITIONERS HAD NO CONSTITUTIONAL OR STATUTORY RIGHT TO BROADCAST WITHOUT A LICENSE, EVEN IF THE FCC'S PREVIOUS RADIO MINIMUM POWER REQUIRMENTS HAD BEEN CONSTITUTIONALLY SUSPECT.

Because, as described above, there is no statutory or constitutional right to broadcast without a license, Mr. Szoka was not entitled to operate his unlicensed low power radio station, even if the FCC's former rules requiring FM radio stations to operate at certain minimum power levels had been constitutionally suspect (which, as discussed in Section IV below, they were not). Thus, even assuming that the FCC's former regulations requiring minimum power levels for radio stations had somehow infringed upon the First Amendment,

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casting without a license," infringed the First Amendment); *U.S. v. Any and All Radio Station Transmission Equipment*, 204 F.3d at 665-66 (explaining that the Supreme Court in the *NBC* case had "affirmed the Communications Act and its licensing standard"); *U.S. v. Weiner*, 701 F. Supp. at 16 (Section 301 of the Communications Act "which grants the Federal Communications Commission the power to control and regulate channels of radio transmission has been held to be valid").

Mr. Szoka had no right to simply start broadcasting without a license, given the clear bar in the Communications Act against unlicensed broadcasting—a prohibition that this Court has expressly determined to be constitutional. As the court of appeals in this case correctly observed, "[p]ermitting Szoka or anyone else to operate without a license as a means of challenging" the FCC's low power broadcasting rules could cause the "very 'chaos' that, according to the Supreme Court, the broadcast licensing regime was designed to prevent." *Grid Radio*, 278 F.3d at 1321 (*quoting Red Lion*, 395 U.S. at 375-76). Pet. App. at A11.[7]

The court of appeals also correctly noted the course that Mr. Szoka should have taken if he wished to challenge the constitutionality of the FCC's former regulations setting certain minimum power levels for FM stations. Rather than engaging in unlicensed broadcasting in violation of the Communications Act, Mr. Szoka could have petitioned the FCC for a rulemaking seeking a change in the low power broadcasting rules, or applied for a waiver of the FCC's minimum power level requirements, and, if the Commission denied either request, then "challenged that denial in the appropriate circuit court." *Grid Radio*, 278 F.3d at 1321. Pet. App. at A12. In this manner, Mr. Szoka could have challenged the constitutionality of the FCC's former low power broadcasting rules, without violating federal law or threatening "the FCC's orderly allocation of scarce resources and the clear communication of current and future licensees." *Ruggiero v. Reno*, 200 F.3d at 65.

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[7] Other courts have agreed that unlicensed microbroadcasting "threatens the FCC's orderly allocation of scarce resources and the clear communication of current and future licensees." *Ruggiero v. Reno*, 200 F.3d at 65 (affirming grant of injunction prohibiting a low power radio station from broadcasting without a license, concluding that the government "sufficiently showed irreparable harm" warranting grant of the injunction "simply by establishing that plaintiffs were broadcasting without a license").

Moreover, NAB observes that, even if the FCC's previous FM power level requirements had been properly challenged in court and had been invalidated on some basis, Mr. Skoza would not even then have been entitled simply to start broadcasting. Assuming that a court decision had overturned the FCC's former minimum power level regulations, such a decision would only have entitled Mr. Szoka, along with any other interested parties, to submit to the Commission an application for a low power station license. And in order to receive a license, Mr. Szoka would have needed to satisfy the citizenship, character and other requirements necessary for FCC licensure, and prevail (under criteria established by the FCC) against any competing applicants who might have applied to operate a low power station on the same frequency as Mr. Szoka.[8] Thus, even a court decision invalidating the FCC's previous rules setting minimum power levels for FM stations would in no way have justified Mr. Szoka commencing broadcast operations without a license, nor automatically entitled Mr. Szoka to obtain a low power license.

This fact further distinguishes the instant case from the other licensing and permitting cases relied upon by

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[8] The Communications Act expressly provides that "[a]ll applicants for station licenses . . . shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station." 47 U.S.C. § 308(b). Pursuant to Section 308(b), the FCC requires applicants for all broadcast licenses to meet, *inter alia*, certain character qualifications. *See Character Qualifications*, 102 FCC 2d 1179 (1985), *recon. denied*, 1 FCC Rcd 421 (1986), *as modified*, 5 FCC Rcd 3252 (1990) and 7 FCC Rcd 6564 (1992). The FCC's character policies and reporting requirements focus on misconduct that violates the Communications Act or a Commission rule or policy and on specified types of non-FCC misconduct, including discrimination, making fraudulent statements to other governmental units, and felonies. All broadcast applicants are also required to certify that they are not subject to a denial of federal benefits under Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862.

Petitioners. In those decisions involving nonbroadcast licensing, the parties would have been entitled to start "speaking" once the permitting scheme at issue was found constitutionally infirm.[9] As discussed in detail above, even a court decision invalidating the FCC's previous radio power level rules would have not entitled Mr. Szoka to simply start speaking (*i.e.*, broadcasting). The court of appeals therefore properly affirmed the FCC's order directing Mr. Szoka to cease his unlicensed broadcasting and imposing a monetary forfeiture, regardless of any allegations as to the constitutionality of the FCC's radio minimum power requirements.

IV. THE FCC'S PREVIOUS MINIMUM POWER REQUIREMENTS FOR FM RADIO DID NOT VIOLATE THE FIRST AMENDMENT.

As explained in Section III above, Mr. Szoka would not have been entitled to operate an unlicensed radio station even if the FCC's former regulations establishing minimum power levels for FM radio stations had been constitutionally infirm. But, contrary to Petitioners' claims, the FCC's previous rules requiring minimum power levels for FM stations did not violate the First Amendment, nor even raise any serious constitutional questions.[10]

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[9] For example, once this Court in *Lovell*, 303 U.S. 444, voided the city ordinance prohibiting the distribution of literature without a permit, the petitioner in that case would have automatically been entitled to "speak" (*i.e.*, distribute literature).

[10] Whether the FCC's previous low power broadcasting rules were unwise or inappropriate public policy is not at issue here. The Petition (at 18-22) raises only the constitutional claim. *See also NBC*, 319 U.S. at 224 (this Court stated that it was the "wrong forum" for pleas that FCC regulations were "unwise" or unlikely "to succeed in accomplishing what the Commission intended," as the Court had "neither technical competence nor legal authority to pronounce upon the wisdom" of any challenged regulations). Moreover, the fact that the Commission later changed its minimum power requirements and determined to license

This Court has generally held that the Commission possesses "broad authority" under the Communications Act to "allocate broadcast licenses." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978) (*NCCB*).[11] In *NCCB*, the Court rejected a First Amendment challenge to a Commission rule that barred the owners of newspapers from acquiring any broadcast stations in their communities. *Id.* at 798-802. This rule completely barred a specified class of speakers from engaging in radio or television broadcasting by either obtaining a license for a new station from the FCC or by acquiring an existing station, and thus had a far more preclusive effect than the FCC's rules establishing minimum power levels for FM radio stations. Since this Court has held that the FCC can constitutionally prevent some persons from engaging in radio or television broadcasting in their communities, *a fortiori*, it may constitutionally determine that the FM radio band will be

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certain low power stations does not in any way imply that the FCC's previous policy was *constitutionally* infirm. It only means that the FCC subsequently altered its view of how the public interest would be best furthered, and the Commission has ample authority under the Communications Act to modify its policy judgments. *See, e.g., Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991) (FCC acted within its authority in changing its broadcast licensing policy with regard to commercial and noncommercial television licensees, as agencies enjoy wide latitude when using rule makings to change their own policies and the manner by which their policies are implemented).

[11] *Accord United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding the FCC's authority to establish initial eligibility standards for broadcast licensees). The courts have also consistently deferred to the Commission's broad discretion in the exercise of its authority regarding the allocation of spectrum, interference problems, and licensing decisions. *See, e.g., Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 596 n.12 (1950); *American Radio Relay League, Inc. v. FCC*, 617 F.2d 875, 879 (D.C. Cir. 1980); *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 636 (D.C. Cir. 1976).

restricted to licensed users broadcasting in accordance with specified operating conditions, such as minimum power levels.[12]

Despite the Petitioners' contention to the contrary (*see* Petition at 2), the courts of appeal that specifically addressed the constitutionality of the FCC's former low power broadcasting rules did not suggest that those rules likely raised any serious constitutional concerns. In *Prayze FM v. FCC*, the Second Circuit Court of Appeals concluded that the FCC would likely prevail in a constitutional challenge to the agency's policy to require FM stations to operate at certain minimum power levels. 214 F.3d 245, 252-53 (2nd Cir. 2000) (affirming district court's grant of preliminary injunction against an unlicensed low power FM station). Indeed, the court in *Prayze FM*, 214 F.3d at 252, explicitly rejected the claim by the unlicensed broadcaster that the FCC's low power broadcasting regulations were "not sufficient closely tailored" to pass constitutional muster—the same argument asserted by Petitioners here. *See* Petition at 19-20. The Sixth Circuit Court of Appeals similarly found little merit in the claims of an unlicensed microbroadcaster that the FCC's minimum power level requirements were "an unconstitutional prior restraint on speech." *U.S. v. Any and All Radio Station Transmission Equipment*, 204 F.3d at 666-67 (concluding that cases cited by an unlicensed broadcaster to support generalized First Amendment claims had nothing to do with "unlicensed radio broadcasting," and

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[12] *Accord NBC*, 319 U.S. at 226 (upholding against a First Amendment challenge a Commission determination to refuse to grant broadcast "licenses to persons who engage in specified network practices"); *Turro v. FCC*, 859 F.2d 1498, 1500 n.2 (D.C. Cir. 1988) (finding no First Amendment issues raised by FCC denial of a request for a waiver of its rule prohibiting low power "translator" stations, which rebroadcast the signals of full power stations, from originating their own local programming).

affirming the district court's refusal to grant the unlicensed broadcaster an injunction against a governmental forfeiture action).

These appellate courts correctly concluded that the FCC's previous rules setting minimum power levels for FM stations should likely survive any First Amendment challenge. Assuming *arguendo* that, to pass constitutional muster, the low power radio rules should have been "narrowly tailored to further a substantial governmental interest," *FCC v. League of Women Voters of California*, 468 U.S. 364, 380 (1984), the FCC's former rules would easily meet this "intermediate" standard of review.[13] Without question, the maintenance of a system of radio broadcasting free from debilitating interference constitutes a substantial governmental interest. *Prayze FM*, 214 F.3d at 252-53 (citing "the substantial government interest in allowing" broadcasters "to operate free of interference"). *See also FCC v. Sanders*, 309 U.S. at 474 (the allocation and regulation of radio frequencies were needed to prevent "confusion and interference," which would "deprive[] the public of the full benefit of radio audition"). Indeed, Petitioners do not attempt to dispute the substantiality of the governmental interest.

The FCC's former low power broadcasting rules were, moreover, "sufficiently closely tailored" to "further this substantial government interest." *Prayze FM*, 214 F.3d at 252. NAB emphasizes that "a regulation need not be the least

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[13] And since rules requiring minimum power levels for FM stations are both content neutral and technical in nature (rather than directly speech-related as the "anti-editorializing" rule at issue in *League of Women Voters*), they should arguably be reviewed under only a "rational basis" test, and upheld if they bear a *reasonable* relation to a legitimate governmental purpose. *See NCCB*, 436 U.S. at 802 (even though the rule at issue barred a specified class of persons from engaging in either radio or television broadcasting in their communities, this Court upheld the rule as a "reasonable means of promoting the public interest in diversified mass communications").

speech-restrictive means of advancing the Government's interests" to satisfy the "narrow tailoring" standard. *Turner*, 512 U.S. at 662. Rather, the narrow tailoring requirement would be satisfied in this case if the government's substantial interest in interference free FM broadcasting would have been "achieved less effectively absent" the FCC's policy. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

An examination of relevant FCC orders shows that the Commission acted with due consideration, and carefully addressed the arguments for and against mandatory minimum power levels before concluding that its interest in preventing "destructive interference" would be most effectively served by retaining minimum power requirements for FM stations.[14] As the Commission explained in detail, a low power FM station could operate at a distance from a high power station without destructive interference to the low power station's signal because the high power station's signal would be weakened with distance. However, the Commission found this "unacceptable from a public interest standpoint because the lower power station would cause objectionable interference to the reception by the audience of the primary station's signal." *Dunifer*, 11 FCC Rcd at 724. The Commission believed that "[s]uch interference to the primary station *could be difficult to identify and correct, and would serve to lower the quality of the FM broadcasting service.*" *Id.* (emphasis added). Thus, the Commission was entitled to conclude that general rules requiring FM stations to operate at certain minimum power levels and at specified minimum distance separations would "achieve[]" its "substantial" interest in interference-free broadcasting more "effectively"

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[14] *Memorandum Opinion and Order, In re Stephen Paul Dunifer*, 11 FCC Rcd 718, 721-26 (1995) (*Dunifer*) (summarizing the earlier notice and comment rulemaking proceedings where arguments relating to low power FM broadcasting had been thoroughly addressed, and further discussing reasons supporting the FCC's policy).

than, for example, a policy of accepting any and all applications for low power stations, and then attempting to evaluate them on a case-by-case basis depending upon the level of *predicted* interference in each individual application. *Ward v. Rock*, 491 U.S. at 799.[15]

To insure a lack of objectionable interference in the FM band and to promote more efficient use of the radio spectrum, the Commission has further explained that stations must be precluded from operating on the same (or even adjacent) channels over a considerable geographic area, as demonstrated by the following example:

> A 10 watt station with a 100 meter antenna has a service radius of 5.9 kilometers and a service area of 109 square kilometers. To protect this hypothetical low power station from interference by a co-channel Class A FM station operating at 6 kilowatts, we would need to preclude the establishment of that Class A station within a distance of 92.6 kilometers from the transmitter for the low power station. In contrast, one Class A station would preclude another co-channel Class A station within a distance of 115 kilometers. A Class A station, however, operating at 6 kilowatts with a 100 meter antenna has a service radius of 28.3 kilometers and a service area of 2,516 kilometers. Therefore, while the preclusive effect of a Class A station is 24 percent

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[15] Certainly the adoption of general regulations setting minimum power levels and distance separations for all stations would be more efficient for the Commission to administer and would consume less administrative resources. And despite the Commission's general rule against operating below specified power levels, any prospective FM applicant would have been entitled to request a waiver of that rule, which the Commission was required to give the requisite "hard look." *WAIT Radio v. FCC*, 418 F.2d 1153, 1159-60 (D.C. Cir. 1969). *See Prayze FM*, 214 F.3d at 253 (noting the "existence of the waiver provision" as a factor in concluding that the FCC's low power broadcasting rules would likely pass constitutional muster).

> greater than the 10 watt station . . . , the service radius of a Class A station is *almost 500% greater* than the smaller station . . . . If we treat preclusion as a cost and service as a benefit, the cost/benefit ratio improves with power; *but the ratio is very poor for low powered stations.*[16]

Given the need to "avoid destructive interference" and the significant "preclusion" that the existence of low power stations would have on the establishment of full power stations, *Dunifer*, 11 FCC Rcd at 725, the Commission's former rules setting minimum power levels for FM radio stations cannot be regarded as insufficiently narrowly tailored under an intermediate level of First Amendment review.

Beyond these significant interference concerns, the Commission has additionally explained that, due to the preclusive effect of low power stations detailed above, high power broadcast facilities "are more spectrally efficient" and can "serve communities and mobile audiences" better than low power stations. *Id.* at 724-25. Contrary to Petitioners' claims that the FCC's previous power level requirements "gratuitously wast[ed] spectrum" (Petition at 20), the Commission clearly had a legitimate basis for concluding that its previous policy actually made *more* efficient use of the limited spectrum resource. *See id.* at 725 (the licensing of low power stations in any given region "would lead to a larger number of stations, but less overall service" within the region, due to "multiple interfering signals"). In any event, Petitioners have no basis for asserting that the FCC's former policy judgments about the efficient use of radio spectrum—even if arguably

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[16] *Dunifer*, 11 FCC Rcd at 725 (emphasis added). A "Class A" FM station was, at that time, the lowest-powered class of FM stations for which the FCC would grant new licenses. "Co-channel" stations are ones that operate on the same channel. A station's "service area" is simply the geographic area where its signal reaches listeners.

"unwise" or unlikely "to succeed in accomplishing what the Commission intended"—were somehow *constitutionally* infirm. *NBC*, 319 U.S. at 224.

Finally, regardless of any arguments about the constitutionality of the FCC's *former* regulations establishing minimum power levels for FM stations, those rules are no longer in force. As noted in the Petition (at 5-6), the Commission in 2000 altered its power level requirements, and determined to issue licenses for low power FM stations. *Report and Order, Creation of Low Power Radio Service*, 15 FCC Rcd 2205 (2000). Congress subsequently acted to determine by statute the extent to which low power radio stations may be licensed. *See* Radio Broadcasting Preservation Act of 2000, Pub. L. No. 106-553, 114 Stat. 2762, App. B., § 632 (due to interference concerns, Congress required the Commission to maintain minimum distance separations between stations operating on adjacent channels, thereby reducing the number of low power stations that can be licensed). In light of recent Commission and Congressional action supplanting the FCC's former rules requiring FM radio stations to operate at certain minimum power levels, there is no reason for this Court now to review those rules. Agency regulations that no longer exist certainly do not warrant this Court's time and attention.

CONCLUSION

Because, for the foregoing reasons, Petitioners have failed to identify any circumstances warranting further review, respondent National Association of Broadcasters urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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